

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OKLAHOMA**

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State of Oklahoma, et al.,	)	
	)	
	)	05-CV-0329 GKF-SAJ
	)	
Plaintiffs,	)	
	)	
v.	)	<b><u>DEFENDANTS' JOINT MOTION</u></b>
	)	<b><u>FOR CLARIFICATION OF</u></b>
Tyson Foods, Inc., et al.,	)	<b><u>COURT'S OCTOBER 28, 2008 ORDER</u></b>
	)	
	)	
Defendants.	)	<b>EXPEDITED CONSIDERATION</b>
	)	<b>REQUESTED</b>
	)	

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On October 28, 2008, this Court issued an Order (Dkt. No. 1787) that granted in part and denied in part Defendants' Joint Motion to Enforce Scheduling Orders (Dkt. No. 1759). Because the Order does not address particular issues raised by the Motion, Defendants respectfully seek limited clarification of the Order, and offer this integrated brief in support.

The Court's Scheduling Orders created staggered expert report deadlines for Defendants based on a number of factors including the specific needs of individual responsive experts. The August 8, 2008 Order had set a primary deadline of October 14, 2008. (Dkt. No. 1756 at 4.) That Order also set several later expert report deadlines for persons and subject matter categories, which Defendants set forth in the following chart for the Court's ease of reference:

December 12, 2008	<ul style="list-style-type: none"> <li>▪ Bierman</li> <li>▪ Modeling</li> </ul>
December 15, 2008	<ul style="list-style-type: none"> <li>▪ McGuire</li> <li>▪ Drinking water quality</li> <li>▪ Erosion</li> </ul>
December 19, 2008	<ul style="list-style-type: none"> <li>▪ Sullivan</li> <li>▪ Home</li> <li>▪ Connolly</li> <li>▪ Chadwick initial report</li> <li>▪ Aquatic ecology</li> <li>▪ Limnology</li> </ul>

May 30, 2009	<ul style="list-style-type: none"> <li>▪ Chadwick final report</li> <li>▪ Final report on spring sampling</li> </ul>
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(Id. at 4-6.) Subject matter categories are necessary as there is no simple one-to-one correlation between each Plaintiffs' expert and each defense expert, and because the need may arise for separate Defendants to retain additional experts.

Defendants' underlying Motion sought relief from the prejudice caused by Plaintiffs' continued expert disclosures and "errata" after the Court's deadlines. One key request was the extension of all impacted expert report deadlines to offset the time wasted by Defendants' attempts to respond to several reports that Plaintiffs now admit were erroneous.<sup>1</sup> (E.g., Dkt. No. 1759 at 1, 25.)

The majority of the problems presented by Plaintiffs' experts' supplementations arose in the area of fate-and-transport issues, including new materials from Plaintiffs' experts Bernard Engel, Bert Fisher, Roger Olsen, and Jan Stevenson. (E.g., Dkt. Nos. 1759 at 4-10, 1767 at 1-6, 1782 at 1-2, and supporting exhibits; Oct. 8, 2008 Hrg. Tr. at 6-9, 32, 38-40; Dkt. No. 1786.) The biggest single contributor to Defendants' prejudice has been Dr. Engel either directly or through other experts' use of Engel's materials. In a domino effect, Dr. Engel's extensive errata caused several of Plaintiffs' other experts to issue their own errata, causing Defendants enormous delay and huge losses of effort and expense.

Because Plaintiffs' experts' new information arose primarily in the arena of fate-and-transport, Defendants' motion focused on the need for additional time for the Defendants' experts who are addressing those same issues. To that end, Defendants offered supporting declarations from Drs. Bierman and Sullivan attesting to the delay, wasted time, and other

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<sup>1</sup> The work of Defendants' expert Dr. Chadwick and the related work in the category of spring sampling were not affected by Plaintiffs' errata and not implicated in Defendants' Motion.

prejudice caused by the “errata.” (See Dkt. Nos. 1759-3, 1759-4, 1767-2, 1767-3.) Both of these experts had post-December 1 report deadlines under the Court’s prior schedule, and both will address (in part) fate-and-transport issues.

Defendants also agreed during the October 8 hearing to provide descriptions of the topics for all testifying experts that they currently plan to use as a group or individually on all issues except damages. (See Oct. 8, 2008 Hrg. Tr. at 100-02; Dkt. No. 1786.) Although that agreement is not memorialized in the October 28 Order, Defendants abide by their commitment and attach here as Exhibit 1 a list of all currently intended retained experts – complete with topic area descriptions.

In its October 28 Order, this Court agreed that Plaintiffs’ expert “supplementations are detrimental to the timely resolution of this case” and that, indeed, “[t]hese delays harm all parties, postponing the date on which either side may receive an ultimate resolution.” (Oct. 28, 2008 Ord. at 4; Dkt. No. 1787.) In granting Defendants’ Motion in part, the Court found that “[a]s Defendants have attempted to respond to Plaintiff’s experts, they have been addressing a moving target, resulting in a waste of time and resources.” (Id.) Hence, “[t]he ongoing errata effectively force[] the court to extend the date Defendants’ expert reports are due.” (Id.)

The Court concluded that “[t]he most appropriate relief which the court can provide to Defendants is to extend the date on which their expert reports are to be submitted.” (Id.) However, in granting Defendants an extension of the pretrial schedule to account for the time lost due to Plaintiffs’ failure to provide sufficient expert reports in the first instance, the October 28 Order directed only “an extension to December 1, 2008 for Defendants’ expert reports.” (Id. at 5.) In other words, the Court granted Defendants’ request for a general extension of their

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Hence, Defendants requested no change in these deadlines.

expert report deadlines, and provided a six-week extension from October 14, 2008. The Order, however, makes no specific mention of the several post-December 1 expert report deadlines, particularly those for Defendants' fate-and-transport experts, and Defendants therefore seek clarification.

Defendants submit that the Court's reasoning and holdings in the October 28 Order suggest that an extension of **all** of Defendants' affected expert deadlines is warranted. Consistent with the Court's decision to extend the October 14 deadlines to December 1, 2008, Defendants request that the Court clarify that its partial grant of the Motion to Enforce Scheduling Orders includes the following extensions of the pretrial schedule, extending each of Defendants' affected liability expert deadlines by six weeks:

January 23, 2009	<ul style="list-style-type: none"> <li>▪ Victor Bierman</li> <li>▪ Modeling and other fate-and-transport experts (includes Brian Murphy in part)</li> </ul>
January 26, 2009	<ul style="list-style-type: none"> <li>▪ Michael McGuire</li> <li>▪ Drinking water quality</li> <li>▪ Erosion (includes Wayne Grip in part)</li> </ul>
January 30, 2009	<ul style="list-style-type: none"> <li>▪ Timothy Sullivan</li> <li>▪ Alex Horne</li> <li>▪ John Connolly</li> <li>▪ James Chadwick</li> <li>▪ Aquatic ecology (includes Tom Ginn in part)</li> <li>▪ Limnology (includes Tom Ginn in part)</li> </ul>

Finally, because the mid-December deadlines set out in the August 8 Order are fast approaching, Defendants seek expedited consideration of their Motion for Clarification.

Respectfully submitted,

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